Draft for Commission Review and Comment

Civil Remedies for Invasion of Privacy
Updating the Law to Reach New Technology

Contents

Protecting Privacy in the Technological Age

Everyone needs a certain amount of privacy for their emotional wellbeing—to have solitude in their homes, to have control over personal information, to be free from surveillance, and to protect their reputations. Generally, privacy is the right to be left alone. Unfortunately, shielding one's privacy has become increasingly difficult. Although traditional legal remedies protect against physical invasions of privacy and exposure of private information, they do not explicitly protect against the use of technological devices to reveal private activities that couldn't otherwise be seen or heard. Current law allows a person whose privacy has been violated to bring a lawsuit for

- unreasonable intrusion upon the seclusion of another or
- unreasonable publicity given to the other's private life.

These rights to sue are not mutually exclusive, and many privacy lawsuits involve both. These are judicial not statutory remedies—often called *common law*—and have traditionally been used only to protect against physical privacy invasions and publication of private information. No cases involving the use of technological devices to invade someone's privacy without some public disclosure of information thus obtained have been reported, so it is impossible to know whether courts would allow someone to recover damages in a case of that kind.

Related common law provisions often discussed as privacy protections that, in fact, need not involve private matters include

- appropriation of the other's name or likeness and
- publicity that unreasonably places the other in a false light before the public.

House Bill 1855 by Representative Ryan Williams (Senate Bill 1840 by Norris), during the second session of the 108th General Assembly, would have done that by creating a new remedy for capturing or attempting to capture an image or recording through the use of a visual or auditory enhancing device—what we might call a virtual invasion of privacy—regardless of whether the image or recording were published. See appendix A for a copy of the bill. It would also have strengthened existing law in certain cases by creating harsher penalties for

- physically trespassing with the intent to capture an image or recording;
- assaulting or falsely imprisoning someone for the purpose of capturing an image, recording, or physical impression of the plaintiff; and
- directing or inducing another person to do one of the above, including the new remedy.

Representative Williams argued that the declining cost and ready availability of powerful telephoto lenses and parabolic microphones allow detailed images and recordings to be made

from greater distances than otherwise possible. Representative Williams' bill did not explicitly mention the use of unmanned aircraft (often called drones) to carry traditional photographic or recording equipment; therefore, it's not clear whether the bill would reach an invasion of privacy by that means, although drones flown low enough might constitute trespass under current law. Ensuring that remedies for invasions of privacy extend to the use of these technologies could best be done through legislative action.

Legislation similar to House Bill 1855 was introduced in 2011 but failed to make it out of committee. No bill that would have created a like cause of action was found in the records of earlier General Assemblies. Similar legislation has been passed in California and proposed but not adopted in Hawaii. The California law was amended in 2014 to reach the use of drones.

The traditional remedies allow recovery only for actual losses and, under the most egregious circumstances, punitive damages. Punitive damages would have been explicitly authorized by the bill but capped at three times actual damages. Actual losses for the ordinary person are often minimal and may be difficult to prove, making punitive damages minimal as well, even under the proposed bill. Of more importance, though probably not to the ordinary person, is a provision that seems to have been designed more to benefit persons whose actual damages are substantial and would have provided for payments of any profits to the aggrieved party if the image or recording were made for commercial purposes, regardless of whether it was ever published.

The bill, sent to the Commission by the House Civil Justice Committee, included an amendment that would have exempted "established news media," which raises both Fourteenth Amendment equal protection issues and First Amendment freedom of the press issues.[1] If challenged, the amendment would probably be ruled unconstitutional. A second constitutional concern with the bill is that the United States Supreme Court has never allowed penalties against a publisher of truthful matters of public concern, even when the party that published the material knew it was obtained illegally. Although a lawsuit brought under those circumstances would likely fail on constitutional grounds, that possibility would not render the bill itself unconstitutional.

[1] See appendix B for a copy of the amendment.

Privacy versus the Public's Right to Know

> One lesson of modern privacy law . . . is that if you expect legal protection for your privacy, you should stay inside your house with the blinds closed. [The] law clings stubbornly to the principle that privacy cannot be invaded in or from a public place. However sound this rule once may have been, it is flawed in a modern technological society . . . .—Professor Andrew McClurg

At the most basic level, the idea of privacy embraces the desire to be left alone, free to be ourselves.[2] Privacy is important for emotional wellbeing and necessary for an autonomous life.[3] Most people recognize and respect that each person has a part of their life that belongs to that individual alone, free from the prying of others, and in fact the law has protected privacy for centuries.[4] Juxtaposed to this is the legitimate need for people in any society to know about important issues, including information about public figures.

The Supreme Court has recognized that the public need for certain kinds of information may outweigh an individual's right to privacy and is protected by the First Amendment.[5] First Amendment protections limit the reach of privacy lawsuits to only those disclosures that are not of "legitimate concern to the public." Since even private information about a public figure is often considered newsworthy, the more prominent one becomes in society, the less privacy one can reasonably expect.

Evolution of Privacy Law

While there is no explicit protection for privacy in the United States or Tennessee constitutions, court decisions starting in the late 19th century have established constitutional rights of privacy and found implied rights in both constitutions. Ten states have gone further, expressly recognizing a right to privacy in their constitutions: Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. In addition, Congress and the states have enacted laws to protect individuals' privacy in various specific areas, such as medical and financial records, and courts have determined a right to privacy in certain areas as well.

Common Law Privacy Protections in Tennessee

The Tennessee Supreme Court first encountered the issue of invasion of privacy in 1956 when it recognized the right to privacy as "the right to be let alone; the right of a person to be free

[2] Wacks 2010.

[3] Solove 2008.

[4] Before 1890 no English or American court had ever expressly recognized the existence of the right, although there were decisions that in retrospect appear to have protected it in one manner or another.

[5] Connick v. Myers, 461 U.S. 138 (1983).

from unwarranted publicity."[6] This quote is based on a long line of cases influenced by the pivotal 1890 Harvard Law Review article "The Right to Privacy" by Samuel Warren and Louis Brandeis, which proposed the creation of a specific legal cause of action for invasion of privacy, describing its origin and nature:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis.* Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, -- the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession -- intangible, as well as tangible. . . .
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> This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Over the decades, state courts slowly recognized the right to privacy, and by the mid-20th century, every state recognized this right. In 1967, Tennessee's Supreme Court[7] revisited the issue of invasion of privacy, acknowledging the widely recognized legal principle that

> A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other. . . . Liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues.[8]

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[6] Langford v. Vanderbilt University, 199 Tenn. 389, 287 S.W.2d 32 (1956).

[7] Martin v. Senators, Inc., 220 Tenn. 465, (1967).

[8] Restatement (First) of Torts (1939)

A 2001 Tennessee Supreme Court case adopted the more specific rule developed in cases elsewhere that

1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
2) The right of privacy is invaded by
    a) unreasonable intrusion upon the seclusion of another;
    b) unreasonable publicity given to the other's private life;
    c) appropriation of the other's name or likeness; and
    d) publicity that unreasonably places the other in a false light before the public.[9]

This is the common law on privacy in Tennessee today. Two of these remedies—"appropriation of the other's name or likeness" and "publicity that unreasonably places the other in a false light before the public"—have been used mainly when the likeness was obtained without invading someone's privacy but are not limited to those situations. In addition to these common law remedies, Tennessee statutes also protect against another person using one's likeness to advertise or solicit goods or services.[10] The false light cause of action, which is similar to defamation, is based on protecting the interest of the individual from publication of false or misleading information about them.

Tennessee law defines "unreasonable intrusion upon seclusion" as intentionally intruding, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, and liability exists if the intrusion would be highly offensive to a reasonable person. Unlike the other privacy remedies, this remedy does not require that the private material have been made public but does require "a reasonable expectation of privacy," a phrase that is not defined in any Tennessee civil case. The language used by the courts, "physically or otherwise," seems to suggest that intrusion upon seclusion could apply to the use of technology to achieve the same result as a physical intrusion; however, there is no Tennessee case law on this point. It is, therefore, unknown whether Tennessee courts would allow recovery for an intrusion using technological enhancement devices without a physical invasion. Further limiting their effectiveness, intrusion lawsuits typically result in paltry, if any, damages because most privacy invasions don't involve physical or financial injury.[11]

"Unreasonable publicity given to the other's private life" involves a third party revealing some fact about the plaintiff that, in the eyes of the community, is simply nobody else's business.[12]

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[9] Section 652A of the Restatement (Second) of Torts (1977).

[10] Tennessee Code Annotated, Section 47-25-1105.

[11] Smolla 2002.

[12] Id.

Tennessee law, like other states, limits this remedy to matters that are highly offensive to a reasonable person and not a legitimate public concern. The first limitation is explained in a footnote to a 2013 Tennessee Court of Appeals case: "In other words, it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. . . . It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy."[13] The second limitation, to matters that are not a legitimate public concern, is driven by the First Amendment of the US Constitution.

Disclosing Matters of Public Concern: First Amendment Protections

The US Constitution's First Amendment protection of free speech and freedom of the press provides broad protections for the dissemination of information in order to benefit the public and restricts government regulation of the press. Protecting disclosure of matters of public concern is at the heart of the First Amendment's protection[14] and reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.[15] Speech concerning public affairs is more than self-expression; it is the essence of self-government.[16] Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.[17]

Consequently, the media has a broad right to publish information that is a legitimate public concern. However, the protection of the press is not unlimited. The truthful information sought to be published must have been lawfully acquired. For example, the press may not with impunity break and enter an office or dwelling to gather news or publish copyrighted material without obeying the copyright laws. The US Supreme Court has never allowed penalties against a publisher of truthful matters of public concern, even when the party that published the material knew it was obtained illegally. For example, in *Bartnicki v. Vopper*, the Supreme Court held that the First Amendment protects the disclosure of illegally intercepted communications by parties who did not participate in the illegal interception. In that ruling, Justice Stevens, writing for the majority, wrote that "in this case, privacy concerns give way when balanced against the interest in publishing matters of public importance."[18]

[13] Jennifer E. Patterson v. Natalie D. Grant-Herms, No. M2013-00287-COA-R3-CV - Filed October 8, 2013, footnote 6.

[14] 'Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, (1985).

[15] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[16] Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

[17] Connick v. Myers, 461 U.S. 138 (1983).

[18] Bartnicki v. Vopper, 532 U.S. 514 (2001)

The United States Supreme Court has stated that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[19] Moreover, the fact that the First Amendment protects disclosures of matters of public concern from broadly written laws protecting privacy does not make those laws unconstitutional on their face. As noted in a 1994 Stanford Law Review article,

> Conventional wisdom holds that a court may declare a statute unconstitutional in one of two manners: (1) the court may declare it invalid on its face or (2) the court may find the statute unconstitutional as applied to a particular set of circumstances. The difference is important. If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application; in contrast, *when a court holds a statute unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances*.[20] [Emphasis added.]

The article went on to discuss *United States v. Salerno* in which the US Supreme Court said, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."

While any law specifically targeting publication by the media of matters of public concern would be unconstitutional, the application of a broader law to such a publication would not render the law itself unconstitutional even though that application of it would be.

Statutory Civil Protections for Privacy in Tennessee

Like many other states, Tennessee has established statutory civil protections, including laws related to trespass, harassment, stalking, and appropriation of another's name or likeness for commercial purposes that provide limited and indirect protection for privacy. Criminal privacy statutes in Tennessee relate only to "peeping tom" behavior[21] and the taking of nonconsensual pictures for purposes of sexual gratification.[22] However, these laws do not address privacy invasions by new technologies.

Technology and Privacy

New technology often spurs the development of privacy law. Warren and Brandeis's 1890 article on "The Right to Privacy" that laid the groundwork for modern privacy law, for example,

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[19] Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

[20] Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235 of January, 1994 by Michael C. Dorf.

[21] Tennessee Code Annotated Section 39-13-607.

[22] Tennessee Code Annotated Section 39-13-605.

was driven by the use of new technology, namely small, inexpensive cameras. In their article, they complained about "recent inventions" such as "instantaneous photographs" and "numerous mechanical devices that threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house-tops." But the power of those devices pales in comparison to modern technology.

One of the best protectors of privacy has traditionally been physical space,[23] but new technologies have eroded the protections provided by space by allowing intrusions into another's private moments without ever setting foot onto private property. Powerful telephoto lenses and parabolic microphones allow detailed images and recordings to be made from great distances otherwise not possible. If these technologies were not available, the photographer or recorder would have to physically trespass onto private property to capture the same images or recordings. For example, even though physical access to a property may be limited, a photographer may obtain the same photograph of a subject using a telephoto lens that would otherwise require a physical trespass.

Unmanned aircraft, or drones, are another example of a technology that presents privacy concerns because some intrusive uses of them may potentially escape liability under existing law. Drones are becoming cheaper and more prevalent, and the very features that make them so promising for commercial purposes—particularly their maneuverability and ability to carry various kinds of sensing or recording devices—are the same features that make them a potential threat to privacy.[24] While flying a drone at low altitude over private property could be an unlawful trespass under current law, flying one at higher altitudes likely would not unless the person somehow unreasonably interfered with the owners' use of the land. Under the traditional common law, a landowner's property rights extended up to the heavens. This rule, however, was overturned in the 1946 US Supreme Court case *United States v. Causby*, which held that owners retain property rights to "at least as much of the space above the ground as he can occupy or use in connection with the land," and invasions of that airspace "are in the same category as invasions of the surface," but it did not define exactly how high these rights extend.

House Bill 1855: Enhanced Damages and a New Right to Sue for Privacy Invasions

Responding to concerns that Tennessee courts might not extend existing privacy protections to cases that do not involve physical trespass and that existing remedies are not a sufficient deterrent to those who would use these means to document or expose the private matters of others, Representative Ryan Williams introduced House Bill 1855,[25] which was sent to the Commission by the House Civil Justice Committee of the 108th General Assembly. The entire focus of the bill was on images, sound recordings, and other physical impressions of "personal

[23] Privacy, Technology, And the California "Anti-Paparazzi" Statute, 112 Harvard Law Review 1367 (1999).

[24] Clark 2014.

[25] Senate Bill 1840 by Norris.

or familial activity," not on privacy generally, and included provisions making trespass and assault or false imprisonment for that purpose, as well as soliciting or causing another to capture such images, explicitly unlawful and subject to specific penalties.

Similar legislation was introduced in 2011 but failed to get out of committee.[26] Both bills were closely modeled after the California Privacy Protection Act[27] and would have excluded the lawful activities of law enforcement personnel and other public or private employees investigating illegal activity. Professor Erwin Chemerinsky, one of the drafters of the California law, described its underlying concept:

> The press and others should not be able to gain through technology what they cannot otherwise obtain except by breaking the law or exposing themselves to civil liability. Any image or sound that can be obtained only by a physical trespass should not be obtainable by technology, if it is of personal or family activity where there is a reasonable expectation of privacy.[28]

Hawaii attempted to pass a similar law in 2013, but it failed in the House after passing the Senate. No other state has considered this type of legislation.

A New But Limited Right to Sue for "Constructive" Invasion of Privacy

House Bill 1855 would have created an entirely new civil cause of action for invasions of privacy using visual or auditory enhancing devices. Like the California law it is modeled on, the scope of this new cause of action is very narrow. A lawsuit brought based on it would be successful only if a person

(1) captures or attempts to capture an image, recording, or physical impression of

(2) "personal or familial activity"

(3) when and where there is a reasonable expectation of privacy

(4) through the use of a visual or auditory enhancing device

(5) otherwise not obtainable without a physical trespass

(6) in a manner that is offensive to a reasonable person.

The bill defines "personal or familial activity" as including "intimate details of the plaintiff's personal life, interactions with the plaintiff's family or significant others, other aspects of the plaintiff's private affairs or concerns, or the activities of victims of crime." The bill does not define "reasonable expectation of privacy," nor have Tennessee courts, but some states' courts have drawn on Fourth Amendment search and seizure cases to define it in privacy lawsuits as

[26] House Bill 1663 by Moore and Senate Bill 2025 by Stewart.

[27] See appendix C for a copy of California Civil Code Section 1708.8.

[28] Chemerinsky 2000.

the actual belief that the situation or matter is private and that others would consider that belief reasonable. By this definition, there is no reasonable expectation of privacy in public places or where one can be seen with the naked eye from a public place.

The bill neither defines nor explains what "visual or auditory enhancing devices" are except through the following phrase, "otherwise not obtainable without a physical trespass." The legislative history for the California law that this bill was modeled on suggests that it would include things such as parabolic microphones and powerful telephoto lenses. This language does not specifically address unmanned aircraft, commonly referred to as drones, and it is possible that using a drone to convey an ordinary camera or recording device to capture images in a manner that would otherwise violate the new law would nevertheless escape liability. One way to make sure drones are covered by the bill's constructive invasion of privacy section is would be to replace the phrase "visual or auditory enhancing device" with "any device" as California did this past year.[29]

Finally, the bill neither defines nor further describes "offensive to a reasonable person." As noted previously, Tennessee courts apply a "highly offensive" standard in lawsuits for intrusion upon seclusion or publication of private facts. The difference between offensive and *highly* offensive is not clear and whether the intrusion was highly offensive or not would be a question for a jury. Traditionally, "the degree of intrusion, the context, conduct, and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded" is considered when determining what is offensive.

Deterring Invasions of Privacy: More explicit penalties and third-party liability

Other than this new right to sue, much of the conduct covered by the bill is already illegal in Tennessee under both common law and statutory actions for trespass, assault, false imprisonment, and intrusion upon seclusion, but the bill would have provided greater penalties against those who profit from the conduct prohibited by the bill if committed for a commercial purpose and would have created an explicit right to sue third parties that used the illegally made image, recording, or impression under certain circumstances.

Penalties Under the Proposed Bill

Anyone sued under the bill would be liable for general damages, special damages—collectively known as actual damages—and punitive damages capped at three times the combined amount of the general and special damages. This, like the trespass provision in the bill, is not substantially different from current law; the biggest difference is the cap on punitive damages, which are not capped under current law. The more significant change, though, is the provision for "disgorgement" of any consideration received as a result of conduct forbidden by the bill if (1) committed for a commercial purpose and (2) intended to be or actually sold, published, or

[29] See California Assembly Bill 2306 of 2014.

transmitted. This disgorgement provision, which requires the person who gains from the prohibited conduct to pay the subject of the image, recording, or impression whatever they gained, would likely benefit only those whose image, recording, or impression could be published or sold for pecuniary.

Third Party Liability

Any third parties that used an image, recording, or impression made in violation of the bill would be subject to all of the bill's damage provisions, but only if that third party had

1) actual knowledge that the image or recording was made in violation of the bill and
2) provided compensation for it.

Additionally, the third party liability would only exist for those in the first publication or transaction following the capture of the image, recording, or impression. Likewise, if a person's first publication or transaction were not a violation of the bill, then any subsequent publication or transaction by that person would not be either. As applied to matters of legitimate public concern, however, recovery of damages would likely be unconstitutional even if all of the criteria above were otherwise met.

Constitutional Issues Raised by House Bill 1855

As discussed previously, broadly written laws are not deemed unconstitutional simply because they may or even are unconstitutionally applied. Moreover, when constitutional challenges are anticipated, bills are typically drafted with severance clauses to ensure that constitutional provisions are not stricken along with unconstitutional ones. Thus is the case with this bill. As originally drafted, the bill would have created a right to sue someone who

- "directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate" other provisions of the bill or
- "publicly transmitted, published, broadcast, sold or offered for sale, the visual image, sound recording, or other physical impression with actual knowledge that it was taken or captured in violation of subsection . . . and
- "provided compensation, consideration, or remuneration, monetary or otherwise, for the rights to the visual image, sound recording, or other physical impression."

The fact that someone might sue the press for doing this in the case of constitutionally protected matters of public concern would not make the entire bill unconstitutional or even these particular sections for matters *not* of public concern. However, an amendment adopted by the House Civil Justice Committee likely would be. The amendment not only targets the media but also discriminates among segments of the media, exempting "established news media outlets whose employers are members of recognized professional or trade

associations," which raises both First Amendment freedom of the press issues and Fourteenth Amendment equal protection issues. The amendment would have provided contract journalists protections that freelance journalists didn't receive, and some media outlets would have gotten benefits that others did not. The Fourteenth Amendment equal protection clause of the United States is also potentially violated because the amendment makes a classification between the established news media and everyone else. The Supreme Court is more likely to uphold laws applying to all.

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Persons Interviewed

Patrick Alach, Attorney with the Paparazzi Reform Initiative of Beverly Hills, California

Josh Blackman, Assistant Professor of Law at South Texas College of Law

Sean Burke, Founder & CEO of the Paparazzi Reform Initiative of Beverly Hills, California

Mike Carter, Representative Tennessee House of Representatives, District 29

Erwin Chemerinsky, Dean of the University of California, Irvine School of Law and Constitutional Expert

Maria De Varenne, News Director for the Tennessean

Frank Gibson, Public Policy Director for the Tennessee Press Association

Steven Hart, Tennessee Attorney General's Office of Special Counsel

Rob Harvey, Attorney for the Tennessean

Jon Lundberg, Representative Tennessee House of Representatives, District 1

Dan Haskell, Lobbyist for the Tennessee Association of Broadcasters

Richard Hollow, General Counsel for the Tennessee Press Association

Andrew McClurg, Professor of Law at the University of Memphis School of Law and Privacy Law Expert

Dana Mitchell, California Legislative Attorney

Mickey Osterreicher, General Counsel for National Press Photographers Association

Doug Pierce, Attorney for the Tennessee Association of Broadcasters

Rodney Smolla, Professor of Law at the University of Georgia School of Law and Privacy Law and First Amendment Expert

Eugene Volokh, Professor of Law at UCLA School of Law and First Amendment Expert.

Ryan Williams, Representative Tennessee House of Representatives, District 42 and Bill Sponsor

Appendix A. House Bill 1855 by R. Williams (Senate Bill 1840 by Norris)

SENATE BILL 1840
By Norris

HOUSE BILL 1855

By Williams R

AN ACT to amend Tennessee Code Annotated, Title 20; Title 29; Title 39; Title 40 and Title 66, relative to privacy.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 29, is amended by adding the following language as a new chapter:

29-40-101.

As used in this chapter:

(1) "Actual knowledge" means actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired the visual image, sound recording, or other physical impression, that the visual image, sound recording, or other physical impression was taken or captured in violation of § 29-40-102(a);

(2) "For a commercial purpose" means any act done with the expectation of a sale, financial gain, or other consideration; and

(3) "Personal and familial activity" includes intimate details of the plaintiff's personal life, interactions with the plaintiff's family or significant others, other aspects of the plaintiff's private affairs or concerns, or the activities of victims of crime in circumstances under which § 29-40-102(a) would apply. "Personal and familial activity" does not include any misconduct described in § 29-40-103.

29-40-102.

(a) A civil cause of action may be brought against any person who:

(1) Knowingly enters onto the land of another without permission, or otherwise commits a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person;

(2) Captures or attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass; provided, that this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used;

(3) Commits an assault or false imprisonment for the purpose of, and with the intent to, capture any type of visual image, sound recording, or other physical impression of the plaintiff; or

(4) Directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate this section.

(b)

(1) A defendant who violates this section shall be liable for the following damages proximately caused by the violation:

(A) General damages;

(B) Special damages; and

(C) Punitive damages up to three (3) times the amount of general and special damages combined.

(2) If the plaintiff proves that the violation of this section was committed for a commercial purpose, then the defendant shall be subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation of this section; provided, however, a visual image, sound recording, or other physical impression shall not be found to have been, or intended to have been captured for a commercial purpose unless it is intended to be, or was in fact, sold, published, or transmitted.

(c)

(1) The transmission, publication, broadcast, sale, offer for sale, or other use of any visual image, sound recording, or other physical impression that was taken or captured in violation of subsection (a) shall not constitute a violation of this section unless the person, in the first transaction following the taking or capture of the visual image, sound recording, or other physical impression:

(A) Publicly transmitted, published, broadcast, sold or offered for sale, the visual image, sound recording, or other physical impression with actual knowledge that it was taken or captured in violation of subsection (a), which the plaintiff shall establish by clear and convincing evidence; and

(B) Provided compensation, consideration, or remuneration, monetary or otherwise, for the rights to the visual image, sound recording, or other physical impression.

(2) Any person that publicly transmits, publishes, broadcasts, sells or offers for sale, in any form, medium, format or work, a visual image, sound recording, or other physical impression that was previously publicly transmitted,

published, broadcast, sold or offered for sale, by another person, is exempt from liability under this section.

(3) If a person's first public transmission, publication, broadcast, or sale or offer for sale, of a visual image, sound recording, or other physical impression that was taken or captured in violation of subsection (a) does not constitute a violation of this section, then that person's subsequent public transmission, publication, broadcast, sale or offer for sale, in any form, medium, format or work, of the visual image, sound recording, or other physical impression, does not constitute a violation of this section.

(4) This section applies only to a visual image, sound recording, or other physical impression that is captured or taken in this state in violation of subsection (a) on or after July 1, 2014, and shall not apply to any visual image, sound recording, or other physical impression taken or captured outside of this state.

(d) In any action pursuant to this section, the court may grant equitable relief, including an injunction and restraining order against further violations of this section.

(e) It is not a defense to a violation of this section that no image, recording, or physical impression was captured or sold.

29-40-103. This chapter shall not impair or limit any otherwise lawful activities of law enforcement personnel or employees of public or private entities, who, in the course and scope of their employment, and supported by reasonable suspicion, attempt to capture or capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected illegal activity or other misconduct, the suspected violation of any administrative rule, a suspected

fraudulent conduct, or any activity involving a violation of law or business practices or conduct of public officials adversely affecting the public welfare, health or safety.

29-40-104. This chapter shall not limit all other rights or remedies of the plaintiff in law or equity. The rights and remedies provided in this chapter are cumulative and in addition to any other rights and remedies provided by law.

SECTION 2. This act shall not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before its effective date.

SECTION 3. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 4. This act shall take effect July 1, 2014, the public welfare requiring it.

Appendix B. Amendment by Rep. Lundberg from Civil Justice Committee

Civil Justice Committee 1

Amendment No. 1 to HB1855

Lundberg
Signature of Sponsor

AMEND Senate Bill No. 1840* House Bill No. 1855

By adding the following language to the end of Section 29-40-103 in SECTION 1 of the bill:

This chapter shall not apply to regular or contract employees of established news media outlets whose employers are members of recognized professional or trade associations.

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Appendix C. California Privacy Protection Act

Cal Civ Code § 1708.8

Current through all urgency chapters enacted in the 2014 Sessions of the 2013-2014 Legislature, and Props 41 & 42

Deering's California Code Annotated > *CIVIL CODE* > *Division 3. Obligations* > *Part 3. Obligations Imposed by Law*

§ 1708.8. Invasion of privacy to capture physical impression; Liability for damages; Civil fines

(a) A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another person without permission or otherwise committed a trespass in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.

(b) A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

(c) An assault or false imprisonment committed with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff is subject to subdivisions (d), (e), and (h).

(d) A person who commits any act described in subdivision (a), (b), or (c) is liable for up to three times the amount of any general and special damages that are proximately caused by the violation of this section. This person may also be liable for punitive damages, subject to proof according to Section 3294. If the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant shall also be subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation of this section. A person who comes within the description of this subdivision is also subject to a civil fine of not less than five thousand dollars ($5,000) and not more than fifty thousand dollars ($50,000).

(e) A person who directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate any provision of subdivision (a), (b), or (c) is liable for any general, special, and consequential damages resulting from each said violation. In addition, the person that directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate this section shall be liable for punitive damages to the extent that an employer would be subject to punitive damages pursuant to subdivision (b) of Section 3294. A person who comes within the description of this subdivision is also subject to a civil fine of not less than five thousand dollars ($5,000) and not more than fifty thousand dollars ($50,000).

(f)

(1) The transmission, publication, broadcast, sale, offer for sale, or other use of any visual image, sound recording, or other physical impression that was taken or captured in violation of subdivision (a), (b), or (c) shall not constitute a violation of this section unless the person, in the first transaction following the taking or capture of the visual image, sound recording, or other physical impression, publicly transmitted, published, broadcast, sold or offered for sale, the visual image, sound recording, or other physical impression with actual knowledge that it was taken or captured in violation of subdivision (a), (b), or (c), and provide compensation, consideration, or remuneration, monetary or otherwise, for the rights to the unlawfully obtained visual image, sound recording, or other physical impression.

(2) For the purposes of paragraph (1), "actual knowledge" means actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired the visual image, sound recording, or other physical impression, that the visual image, sound recording, or other physical impression was taken or captured in violation of subdivision (a), (b), or (c). The plaintiff shall establish

actual knowledge by clear and convincing evidence.

(3) Any person that publicly transmits, publishes, broadcasts, sells or offers for sale, in any form, medium, format or work, a visual image, sound recording, or other physical impression that was previously publicly transmitted, published, broadcast, sold or offered for sale, by another person, is exempt from liability under this section.

(4) If a person's first public transmission, publication, broadcast, or sale or offer for sale, of a visual image, sound recording, or other physical impression that was taken or captured in violation of subdivision (a), (b), or (c), does not constitute a violation of this section, that person's subsequent public transmission, publication, broadcast, sale or offer for sale, in any form, medium, format or work, of the visual image, sound recording, or other physical impression, does not constitute a violation of this section.

(5) This section applies only to a visual image, sound recording, or other physical impression that is captured or taken in California in violation of subdivision (a), (b), or (c) after January 1, 2010, and shall not apply to any visual image, sound recording, or other physical impression taken or captured outside of California.

(6) Nothing in this subdivision shall be construed to impair or limit a special motion to strike pursuant to *Section 425.16, 425.17, or 425.18 of the Code of Civil Procedure.*

(7) This section shall not be construed to limit all other rights or remedies of the plaintiff in law or equity, including, but not limited to, the publication of private facts.

(g) This section shall not be construed to impair or limit any otherwise lawful activities of law enforcement personnel or employees of governmental agencies or other entities, either public or private who, in the course and scope of their employment, and supported by an articulable suspicion, attempt to capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected illegal activity or other misconduct, the suspected violation of any administrative rule or regulation, a suspected fraudulent conduct, or any activity involving a violation of law or business practices or conduct of public officials adversely affecting the public welfare, health or safety.

(h) In any action pursuant to this section, the court may grant equitable relief, including, but not limited to, an injunction and restraining order against further violations of subdivision (a), (b), or (c).

(i) The rights and remedies provided in this section are cumulative and in addition to any other rights and remedies provided by law.

(j) It is not a defense to a violation of this section that no image, recording, or physical impression was captured or sold.

(k) For the purposes of this section, "for a commercial purpose" means any act done with the expectation of a sale, financial gain, or other consideration. A visual image, sound recording, or other physical impression shall not be found to have been, or intended to have been captured for a commercial purpose unless it is intended to be, or was in fact, sold, published, or transmitted.

(l) For the purposes of this section, "personal and familial activity" includes, but is not limited to, intimate details of the plaintiff's personal life, interactions with the plaintiff's family or significant others, or other aspects of the plaintiff's private affairs or concerns. "Personal and familial activity" does not include illegal or otherwise criminal activity as delineated in subdivision (g). However, "personal and familial activity" shall include the activities of victims of crime in circumstances under which subdivision (a), (b), or (c) would apply.

(m)

(1) A proceeding to recover the civil fines specified in subdivision (d) or (e) may be brought in any court of competent jurisdiction by a county counsel or city attorney.

(2) Fines collected pursuant to this subdivision shall be allocated, as follows:

(A) One-half shall be allocated to the prosecuting agency.

(B) One-half shall be deposited in the Arts and Entertainment Fund, which is hereby created in the State Treasury.

(3) Funds in the Arts and Entertainment Fund created pursuant to paragraph (2) may be expended by the California Arts Council, upon appropriation by the Legislature, to issue grants pursuant to the Dixon-Zenovich-Maddy California Arts Act of 1975 (Chapter 9 (commencing with *Section 8750) of Division 1 of Title 2 of the Government Code*).

(4) The rights and remedies provided in this subdivision are cumulative and in addition to any other rights and remedies provided by law.

(n) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

History

Added *Stats 1998 ch 1000 § 1 (SB 262)*. *Amended Stats 2005 ch 424 § 1 (AB 381), effective January 1, 2006; Stats 2009 ch 449 § 2 (AB 524), effective January 1, 2010; Stats 2010 ch 685 § 1 (AB 2479), effective January 1, 2011.*

Annotations

Notes

Amendments:

2005 Amendment:

(1) Amended subd (a) by (a) adding "person" after "another"; and (b) adding a comma after "trespass"; (2) added new subd (c); (3) redesignated former subd (c)-(*l*) as subd (d)-(m); (4) amended new subd (d) by substituting "any act described in subdivision (a), (b), or (c)" for (physical invasion of privacy or constructive invasion of privacy, or both,"; and (5) amended new subd (e) by (a) adding "any provision of"; and (b) substituting "(a), (b), or (c)" for "(a) or (b) or both".

2009 Amendment:

(1) Added the last sentence of subd (d); (2) amended subd (e) by (a) substituting "actually induces, or actually" for "instigates, induces, or otherwise" in the second sentence, and (b) adding the last sentence; (3) substituted subd (f) for former subd (f) which read: "(f) Sale, transmission, publication, broadcast, or use of any image or recording of the type, or under the circumstances, described in this section shall not itself constitute a violation of this section, nor shall this section be construed to limit all other rights or remedies of plaintiff in law or equity, including, but not limited to, the publication of private facts."; (4) amended subd (g) by (a) adding "or other misconduct"; (b) substituting "fraudulent conduct, or any activity" for "fraudulent insurance claim, or any other suspected fraudulent conduct or activity"; (c) substituting "business practices or conduct of public officials" for "pattern of business practices"; and (d) adding "welfare," after "public"; (5) substituted "subdivision (a), (b), or (c)" for "subdivision (a) or (b)" in subd (h); (6) added "the" after "other aspects of" in the first sentence of subd (*l*); (7) amended the second sentence of subd (*l*) by (a) adding the quotation marks around the words "Personal and familial activity"; and (b) substituting "subdivision (g)" for "subdivision (f)"; (8) substituted "under which subdivision (a), (b), or (c)" for "where either subdivision (a) or (b), or both," in the last sentence of subd (*l*); (9) added subd (m); and (10) redesignated former subd (m) to be subd (n).

2010 Amendment:

Added "or false imprisonment" in subd (c).